RAMONA AND BOYD LAWSON

IBLA 85-639 Decided November 10, 1986

Appeal from a decision of the Albuquerque District Office, Bureau of Land Management, rejecting color-of-title application NM 52176.

Affirmed as modified.

1. Color or Claim of Title: Applications

> A Class 1 color-of-title claim requires peaceful adverse possession in good faith by claimant or predecessors in interest under claim or color of title for the prescribed period of time. The claim or color of title must be based upon a document from a party other than the U.S. Government which on its face purports to convey the claimed land to the applicant or the applicant's predecessors.

APPEARANCES: Vernon W. Salvador, Esq., Albuquerque, New Mexico, for appellants; Gayle E. Manges, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ramona and Boyd Lawson appeal from a decision of the Albuquerque District Office, Bureau of Land Management (BLM), rejecting color-of-title application NM 52176 for lot 10, which is adjacent to Tract 43, in the SW 1/4 SW 1/4 sec. 22, T. 18 N., R. 12 E., New Mexico Principal Meridian in San Miguel County, New Mexico. 1/ The BLM decision, dated April 11, 1985, stated:

> Color-of-Title application NM 52176, filed December 15, 1981, by Ignacita C. Rivera is rejected under both Class 1 and Class 2 of the Act of December 22, 1928, for the following reasons:
>
> The application is rejected for Class 1 for failure of the claimant and his ancestors to hold the tract in good faith and

1/ Lot 10 encompasses 16.04 acres according to the 1982 plat map. Ramona Lawson's affidavit claims 12 acres.

> peaceful, adverse possession against the United States of America. A claim is not held in peaceful, adverse possession where it was initiated while the land was withdrawn or reserved for Federal purposes. 43 CFR 2540.0-5(b).
>
> As to the alleged survey error, the documents in the file indicate that the monuments from the original survey were used in the 1928 re-survey and the claimant's ancestors acknowledged that the land on which the cabin was located was owned by the United States. The 1946 correspondence with the Department of Interior also appears to be a recognition that the patent did not cover this land since the claimant's ancestors were apparently seeking an amendment of the patent to include lot 10. The claim is not held in good faith where held with knowledge that the land is owned by the United States. 43 CFR § 2540.0-5(b).
>
> The application is rejected for Class 2 for failure of the claimants to establish that taxes have been paid for any significant period.

In 1877, Cristino Rivera made his homestead entry (Appellants' Exhs. 2-5). A survey was conducted in 1883. On May 3, 1888, Cristino Rivera received Homestead Patent 2131 for a tract of land described as S 1/2 SW 1/4, NE 1/4 SW 1/4, NW 1/4 SE 1/4, sec. 22, T. 18 N., R. 12 E., New Mexico Principal Meridian, containing 160 acres (Homestead Certificate 1257, Exh. 1). On January 11, 1892, the township was closed to further homestead entry and reserved for the use of the Department of Agriculture as part of the Pecos River Forest Reserve. 2/ On May 25, 1925, the land was formally withdrawn from all forms of appropriation pending approval of a resurvey.

In 1925, the General Land Office conducted an independent resurvey which created lot 10, the parcel in dispute in this appeal. This survey moved the southwest section corner of sec. 22 to the northeast, so that previously patented tracts, including Tract 43, no longer conformed to the survey. According to current BLM plats, lot 10 includes 16.04 acres in what is now the SW 1/4 SW 1/4 of sec. 22. The south and east sides of lot 10 are adjacent to Tract 43. The 1925 resurvey field notes contain the following statement:

> I understand that part of the Rivera family lives on the adjoining land, and has a forest service lease. I notified Mrs. Rivera at the house on the claim, that I was making the survey and that the other house was not on the tract, with no interest being shown, except to state that they knew the other house was on public land.

(Exh. 8)

2/ Now the Santa Fe National Forest.

By 1946, Tract 43 had passed to Cristino Rivera's son, Encarnacion Rivera, and daughter-in-law, Ignacita Rivera. In 1946, Encarnacion Rivera wrote BLM that he was considering amending his father's homestead entry. Exhibits 9 and 10 to appellants' statement of reasons are Government memoranda indicating his intent to file for amendment. However, these memoranda do not show what amendment he considered or why he later chose not to file. Encarnacion Rivera died in 1966 and his interest in the homestead passed to his surviving spouse, Ignacita Rivera. On August 2, 1979, Ignacita Rivera issued a quitclaim deed (Exh. 15) for lot 10 to appellants, Ramona Lawson (daughter), and Boyd Lawson (son-in-law).

Color-of-title application NM 52176 (consisting of three documents dated December 5, 1981) was filed in the BLM State Office on January 20, 1982. One document, signed by Ignacita Rivera describes her 1979 conveyance to appellants. On the second page Ignacita Rivera indicated that she was filing for both class 1 and class 2, and states that in 1946 her husband, Encarnacion Rivera, informed her that they did not have clear title to the land. The third document, signed by "Ramona R. Lawson (Daughter)," is the class 2 tax levy and payment report form, with an "X" in each blank space, indicating that "taxes were levied and paid from 1933 through 1981." However, the amounts of tax levied or paid were not specified on this form. 3/ BLM rejected the application and then appellants filed this appeal.

In their statement of reasons for appeal, appellants (through counsel) argue that lot 10 belonged to Cristino Rivera, but was subtracted from his patented homestead by the 1925 resurvey. They base their color-of-title application on the 1888 Cristino Rivera patent. They claim he entered and received patent to this land prior to withdrawal of the land and satisfied the requirements of 43 U.S.C. § 1068(a) (1982) including good faith occupation for more than 20 years. Appellants claim this case is typical of the circumstances the Color of Title Act was designed to address. "[T]hree generations of the Rivera family have lived and paid taxes on lot 10 over a period of 108 years" (Statement of Reasons at 5). By contrast, they say, only two disputed items contradict their claim of good faith occupancy; an alleged statement by "Mrs. Rivera," and indications that in 1946 Encarnacion intended to amend his father's homestead. Ignacita Rivera denies that in 1925 a surveyor tried to contact her or discuss the Rivera patent (see Exh. 16). Appellants submit Government letters and memoranda discussing what appellants characterize as a shift in the boundaries of the patented homestead between the 1883 and the 1925 surveys (Exhs. 16-21). They claim they did not know title to lot 10 was in the United States and assert that where there is occupation of an area outside the patented boundary and the boundary is not clearly marked, the applicant may meet the good faith requirements of the statute.

3/ The application listed the taxpayers as: Encarnacion S. Rivera, 1933 through 1965; Ignacita C. Rivera, 1966 through 1978; Ramona Rivera Lawson and Rev. Boyd C. Lawson, 1979 through 1981. The BLM file contains copies of tax information for the years 1933 and 1947 through 1949. The record on appeal was augmented by tax information for 1920-1922, 1930-1933, 1959, 1965, 1983, and 1984. None of these documents clearly indicate payment of taxes on the land in lot 10.

Appellants also argue that the 1925 resurvey created lot 10 in violation of 43 U.S.C. § 772 (1982). Appellants question the correctness of the resurvey itself, particularly the placement of certain stone markers. Alternatively, appellants argue that 16 U.S.C. § 521(d) and (e)(2) (1982) would permit sale of this parcel. They point to the history of remedial statutes designed to permit the correction of erroneous settlement in support of the equitable consideration they request for their claim.

In response, counsel for BLM asserts this color-of-title claim must fail because it was not initiated until after the land sought was reserved for forest purposes. Respondent argues that the 1888 homestead patent was insufficient to initiate color of title because appellants' predecessors in interest believed or had reason to believe the source of title was the United States. Respondent points out that Ignacita Rivera, grantor to the applicants, states on the application that she learned she did not have clear title in 1946. Only two transfer of title documents were presented. The 1888 patent is derived from the United States. The 1979 quitclaim deed, though from a private party, was less than 20 years old, and issued after the grantor became aware that the land belonged to the United States, making it insufficient to support a class 1 color-of-title claim. Respondent does not specifically address the applicants' class 2 claim.

An initial problem with this application arises from the identity of the applicant. Ignacita Rivera filed the color-of-title application in 1981, although she had already conveyed the land by quitclaim deed in 1979. Therefore, she filed the application at a time when she no longer professed ownership of lot 10. BLM addressed its decision to the late Cristino Rivera and to the Lawsons, who pursue this appeal on their own behalf. Appellant Ramona Lawson did sign one page of the color-of-title application as "(Daughter)." Thus, this Board will consider her a co-applicant.

Appellants argue the 1925 resurvey impaired their rights by moving the homestead boundaries to the east. However, the 1925 resurvey was an independent resurvey. Prior to a discussion of appellants' arguments it is important to define an independent resurvey and comment on the resulting implications. The following definition is taken from the Manual of Instructions for the Survey of the Public Lands of the United States, (1973) (Manual) at page 145:

> 6-5. An independent resurvey is an establishment of new section lines, and often new township lines, independent of and without reference to the corners of the original survey. In an independent resurvey it is necessary to preserve the boundaries of those lands patented by legal subdivisions of the sections of the original survey which are not identical with the corresponding legal subdivisions of the sections of the independent resurvey. This is done by surveying out by metes and bounds and designating as tracts the lands entered or patented on the basis of the original survey. These tracts represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions. [Emphasis in original.]

The Manual at page 151 explains further:

> 6-33. An independent resurvey is designed to supersede the prior official survey only insofar as the remaining public lands are concerned. The subdivisions previously entered or patented are in no way affected as to location. All such claims must be identified on the ground, then protected in one of two ways. Whenever possible, the sections in which claims are located are reconstructed from evidence of the record survey just as in a dependent resurvey. Where irrelated control prevents the reconstruction of the sections that would adequately protect them, the alienated lands are segregated as tracts. A particular tract is identical with the lands of a specific description based on the plat of the prior official survey. The tract segregation merely shows where the lands of this description are located with respect to the new section lines of the independent resurvey. In order to avoid confusion with section numbers the tracts are designated beginning with number 37. The plan of the independent resurvey must be such that no lines, monuments, or plat representations duplicate the description of any previous section where disposals have been made. [Emphasis added.]

Therefore, when the independent resurvey was conducted in 1925, the surveyor was charged with marking all boundaries of patented tracts where they were found on the ground, and new section lines were to be drawn without regard to where patent boundaries were originally located. The section lines and corners were resurveyed in 1925 in a new alignment to the northeast of the old 1888 alignment. The Rivera homestead was not moved, but was plotted on the ground where found and designated as Tract 43. Because the section lines were moved, the Cristino Rivera homestead (and other patented tracts in the township) no longer conformed to legal subdivisions. In addition, lots were drawn to designate those areas between the patented tracts and the newly established section lines. "Lot 10" was the designation given to that portion of the SW 1/4 SW 1/4, sec. 22 not a part of the Rivera homestead (Tract 43). The land now designated as lot 10 was originally a part of the NW 1/4 SW 1/4 of sec. 22, and has always been outside the boundaries of the Rivera homestead.

[1] The Color of Title Act (the Act), 43 U.S.C. § 1068 (1982), authorizes the issuance of patent for up to 160 acres of public land held under color of title upon payment of the sale price of the land:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land

> has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres * * *.

A claim under part (a) of this section is defined by the Department as a claim of class 1; a claim under part (b) is defined as a claim of class 2. 43 CFR 2540.0-5(b).

To be entitled to a patent under the Act, a claimant must establish that each of the statutory requirements have been met. The statute directs the Secretary of the Interior to issue a patent for up to 160 acres of land to a person who has in good faith peacefully and adversely possessed public lands under color of title for more than 20 years, placing valuable improvements on the land or cultivating some part thereof, or for a period commencing not later than January 1, 1901, during which they have paid taxes on the land. 43 U.S.C. § 1068 (1982). To further satisfy the statutory requirements for class 1, appellants must establish that their claim of title was based on an instrument which, on its face, purports to convey title to the tract sought. Carmen M. Warren, 69 IBLA 347, 349 (1982). The evidence before us establishes only improvements on the land and more than 20 years occupancy. It fails to demonstrate the existence of an instrument which, on its face, purports to convey title. An applicant must base the claim for color of title upon a document from a source other than the United States, which on its face purports to convey the land to the applicant or predecessor. Robert H. Cooper, 75 IBLA 354 (1983); Anthony T. Ash, 52 IBLA 210, 212 (1981); Mildred A. Powers, 27 IBLA 213 (1976).

Appellants assert that lot 10 was once part of patented Tract 43, thereby basing their claim of title on the patent document from the United States as the source of title to lot 10. However, adverse possession against the United States under this Act based on the mistaken belief that a tract was embraced in one's patented holdings is inadequate because it lacks the basic element of a claim or title derived from some source other than the United States. Marcus Rudnick, 8 IBLA 65, 66 (1972). The issue whether or not a patent includes certain land is not properly raised in a color-of-title application. As the Board stated in Benton C. Cavin, 83 IBLA 107, 109 n.2 (1984), "an applicant for color-of-title relief necessarily admits, for the purpose of consideration of his application, that legal title remains in the Government and, at least insofar as the adjudication of that application is concerned, is estopped from alleging that he owns legal title to the land." We stated further in Jerome L. Kolstad, 93 IBLA 119, 122 (1986),

> Insofar as a color-of-title application is concerned, an applicant necessarily admits the title to the land is in the United States since, by filing the application, an applicant seeks to have the United States convey actual title to him. Thus, an applicant cannot be heard to assert that his color of title is based on a

> patent from the Government because, if this were true, the applicant would possess actual title not color of title. It is for this reason that the color of title upon which an applicant bases his or her claim arise from a source other than the United States. Thus, the patent issued to McCoy cannot serve as a basis for the initiation of appellant's color of title. [Emphasis added.]

See also Minnie E. Wharton, 4 IBLA 287, 295-96, 79 I.D. 9-10 (1972), aff'd, United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). Thus, appellants' homestead patent document cannot support a color-of-title claim.

As explained above, however, lot 10 was never within homesteaded Tract 43. Lot 10 was the designation given to a parcel of land next to the western boundary of Tract 43. As appellants have produced no document originating a chain of title, there is no chain of title. Ownership of lot 10 has continuously been in the United States.

Even if a patent document could provide a sufficient basis for a color-of-title claim, there is no indication in the record that the patent conveyed the land in lot 10. Appellants offered no evidence to show any change in the boundaries of the Cristino Rivera homestead now designated as Tract 43. 4/

The only document in the record which transfers title to lot 10 is the 1979 quitclaim deed from Ignacita Rivera to appellants. Because this document is less than 20 years old, appellants, as Ignacita Rivera's successors in interest, could not use the quitclaim deed to establish a class 1 claim. 5/

Appellants also asserted a class 2 claim. However, this claim is not substantiated. The application claims taxes were paid since 1933, and the statement of reasons (at page 5) asserts taxes have been paid for 108 years. However, appellants have not submitted evidence that taxes were levied and paid for all the years they claim. The Act requires payment of taxes commencing not later than 1901 in order to maintain a class 2 color-of-title claim. 43 U.S.C. § 1068(b) (1982).

The obligation for proving a valid color of title is on the claimant. 43 U.S.C. § 1068 (1982); Mable M. Farlow, 30 IBLA 320, 84 I.D. 276 (1977). In the present situation, appellants have not met their burden of proof.

4/ A comparison of the survey plats approved in 1888 and 1928 indicates the location of a road through the homestead tract remains in the same relative location in the original entry and Tract 43.

5/ Because appellants have not produced any document which could support a color-of-title claim, it is not necessary to address the issue of their good faith in filing the application. Ignacita Rivera may well have acted in the sincere belief that she owned lot 10 when she purported to convey it to her daughter and son-in-law, but this does not constitute "good faith" as the term is used in the Act.

Appellants also question the validity of the resurvey and argue that lot 10 was lost due to the resurvey. They argue that 43 U.S.C. § 772 (1982), precludes loss of lot 10 after resurvey. This statute provides that no resurvey shall impair the rights of any owner or claimant. The rights of a patentee are fixed once a patent has issued, and the Government has no power to interfere with such rights, as by a corrective survey. United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974). The original boundaries, as they were actually surveyed on the ground, fix the position of conveyed land. As explained above, the position of a conveyed tract is not changed by an independent resurvey which does not follow the lines of the original survey used as a basis for the conveyance. See section 6-15, Manual at 147. See United States v. Doyle, 468 F.2d 633, 636 (10th Cir. 1972).

When the resurvey took place, the surveyor established the original boundaries of the patented tract now designated as Tract 43 using the best information available. Corners were monumented with metal caps that are in place. The file does not show a change in the boundaries of the patented homestead. Instead, the section line was moved. Tract 43 still includes 160 acres, the acreage Cristino Rivera received. Lot 10, the designation given to adjacent land between the patented homestead and the new section line, described land that was always outside the homestead boundaries. 6/ The independent resurvey appears to have been properly conducted. There was no challenge to the resurvey at the time. In fact, the 1925 interview indicates the resident of the house on lot 10 considered the homestead corners correct, even though an error would adversely affect her. Had appellants' predecessors considered the boundary wrong, they could have challenged the survey or requested an amendment of the patent. The record does not indicate any such action. In the dubious event that incorrect corners could be shown today, appellants might have a basis for challenging the survey. However, the resurvey indicates that title to lot 10 has always been in the United States. Therefore, we must presume the boundaries were and are correct. The record does not indicate a violation of 43 U.S.C. § 772 (1982) occurred when the 1925 survey was conducted.

Appellants have also argued that 16 U.S.C. § 521(d) and (e) (1982) should permit sale of lot 10. This statute provides for the sale, exchange, or interchange of National Forest lands, at the discretion of the Secretary of Agriculture. This decision does not preclude an application for exchange or sale. 7/

6/ Appellants' argument implies that Tract 43 was moved due to the resurvey, resulting in the loss of lot 10. Had Tract 43 been moved, additional land would have had to have been added to its other side to maintain its size. There is no indication that this happened.

7/ Nor does this decision preclude an application for either a special use permit for use of the cabin on lot 10, or an amendment to patent. But cf. Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980), for the burden on an appellant in such cases.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Albuquerque District Office is affirmed as modified.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge